IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LANDON BINDER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11796 Trial Court No. 3PA-07-2617 CR MEMORANDUM OPINION No. 6309 — March 30, 2016

Appeal from the Superior Court, Third Judicial District, Palmer, Vanessa White, Judge.

Appearances: Elizabeth D. Friedman, Attorney at Law, Palmer, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

Landon Binder pled guilty to one count of possession of child pornography after police officers discovered 3,144 images and 54 videos of child pornography in his possession. He was sentenced to 5 years' imprisonment with 3½ years suspended and

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

3 years' probation. After his release, Binder enrolled in a group sex offender treatment program. He subsequently failed multiple polygraph exams and violated numerous conditions of the treatment program.

Binder was later discharged from treatment, and the State filed a petition to revoke his probation. At his revocation hearing, Superior Court Judge Vanessa White imposed 3 months of Binder's suspended sentence and extended his probation by 4 years.

Binder challenges his sentence, arguing that the court misapplied the *Chaney* criteria and that he was deprived of due process at his revocation hearing. But Binder failed to raise his due process arguments below, and they are therefore waived. Binder also assigns error to the court's factual and legal bases for his probation revocation. Having reviewed the record, we conclude that Judge White relied on appropriate considerations in imposing Binder's sentence and that the sentence is supported by the record.

Binder also argues that the judge erred in failing to modify his conditions of probation to allow him to visit his children and to attend church services. We find Binder's arguments raise concerns justifying a remand for reconsideration of these restrictions.

Finally, Binder argues that the judge erred in failing to redact from the presentence report "letter update" various alleged "factual inaccuracies [that] were challenged during the course of the hearing." As we explain below, Binder failed to preserve this issue for appeal. But we authorize the judge to address the matter in her discretion on remand.

Relevant facts

In April 2006, Palmer police officers executing a search warrant discovered images and videos of child pornography in Binder's possession. Binder was indicted on fifteen counts of possession of child pornography and four counts of distribution of child pornography.[1]

Pursuant to an agreement under Alaska Criminal Rule 11, Binder pled guilty to one count of possession of child pornography. The trial court sentenced him to 5 years' imprisonment with 3½ years suspended, and 3 years' probation. The court also imposed probation conditions requiring Binder to participate in sex offender treatment and limiting his contact with children.

Binder was released in September 2010, but he failed to fully comply with his sex offender treatment requirements. He continued to place himself in high-risk situations involving adult pornography and non-pornographic depictions of young children — including his own infant daughter. He also failed multiple polygraph exams. And according to Binder's probation officer, Binder attempted to manipulate his treatment process by failing to fully disclose problematic behaviors to his probation officer and his treatment provider.

Binder was temporarily suspended from treatment in June 2012. After his suspension, Binder's high risk behavior continued to escalate. During a polygraph, he admitted to stealing women's clothing from customer vehicles at the auto repair shop where he worked. He admitted to photographing a customer's personal photos found in their vehicle. He also admitted to surreptitiously photographing, below the waist, young women in the community. Despite these admissions, he still failed the polygraph.

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[1] AS 11.61.127 and AS 11.61.125, respectively.

Binder was then discharged from treatment, and the State filed a petition to revoke probation on May 22, 2013. The petition alleged that he had failed to comply with his treatment requirements.

Two months later, Binder filed a motion to modify his probation conditions. In the motion, he requested permission to visit his children and attend church "without pre-planning and without pre-approval," a discontinuation of polygraph exams, and permission to participate in one-on-one sex offender treatment.

The judge held an adjudication hearing on July 24, 2013. At that hearing, Binder conceded that he had violated his condition of probation requiring him to actively participate in sex offender treatment.

The court held a combined disposition and motion hearing on November 19, 2013. The State relied on a discharge summary report completed by Binder's treatment provider and an eighteen-page presentence report "letter update" in which Binder's probation officer described Binder's failures to comply with his treatment requirements. Binder testified at the hearing and disputed several factual allegations in the reports.

At the close of the hearing, the State requested leave to respond orally to Binder's motion to modify his probation conditions. Pressed for time, the judge instead allowed the State to file a three-page written response, due the following day. Binder did not object, but he now claims he was denied a right of reply.

The superior court issued its rulings at a hearing several days later: The judge agreed that one-on-one therapy would be more effective for Binder, and she modified his probation conditions accordingly. But she denied Binder's request to allow him to visit his children and to attend church where minors might be present, concluding that those issues were best left to his probation officer's discretion.

Weighing the *Chaney* sentencing criteria, the judge emphasized the goal of individual deterrence. She concluded that a sentence of 3 months was needed

> to try and send home to Mr. Binder the very important message that as challenging as treatment is for sexual [offenders] ... , nonetheless, it is the lynchpin of his successful completion of probation, and that it has to be the absolute focus of his efforts during his period of probation.

She also extended Binder's probation by 4 years. This appeal followed.

Why we reject Binder's due process challenges to his revocation hearing

Binder claims that he was deprived of due process at his revocation hearing because the court relied on the discharge summary report prepared by his treatment provider without affording him an opportunity to cross examine the report's author. But Binder waived this argument by failing to object to admission of the report on that basis at his hearing.[2]

Binder also claims that the judge deprived him of due process by allowing the State to late-file an opposition to his motion to modify his probation conditions without providing him an opportunity to file a reply. But Binder did not object to the judge's decision to allow the State to file a written response, nor did he request an opportunity to file a reply. His argument is thus waived, and we find no plain error in these circumstances.[3]

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[2] *See In re C.L.T.*, 597 P.2d 518, 522 (Alaska 1979).

[3] *Id.*

Why we affirm Binder's sentence

The judge imposed 3 months of Binder's suspended time and extended his probation by 4 years. On appeal, Binder raises a number of claims challenging the factual and legal bases of his sentence. For the reasons explained below, we find no error in the sentence.

Binder first argues that the judge's factual findings undermined the sentence she imposed — namely, that the judge was clearly mistaken in imposing jail time for failure to engage in treatment after concluding that group therapy was not an effective treatment modality in Binder's case. He also argues that the judge's decision to extend his term of probation was unsupported by the evidence.

The judge acknowledged that individual treatment might be more effective in Binder's case, and she modified his conditions of probation accordingly. She nonetheless recognized that Binder's previous participation in treatment had been unsatisfactory. Focusing on the *Chaney* factor of individual deterrence, she determined that a short period of incarceration was necessary to stress the requirement that Binder fully participate in treatment in the future.[4] She also concluded that a 4-year extension of probation afforded an appropriate amount of time to ensure that he could successfully complete his treatment requirements. This conclusion is supported by the evidence before the Court.

Binder also argues that his sentence is inconsistent with this Court's holdings in *Paul v. State*[5] and *Banister v. State*.[6] In *Paul* and *Banister*, this Court upheld

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[4] *See Chaney v. State*, 477 P.2d 441, 444 (Alaska 1970); *see also* AS 12.55.005 (codifying the *Chaney* criteria).

[5] 2014 WL 1168846 (Alaska App. Mar. 19, 2014) (unpublished).

[6] 1998 WL 29856 (Alaska App. Jan. 28, 1998) (unpublished).

the imposition of significant periods of suspended time for revocations of probation that were based on significantly more egregious conduct by the probationers.[7] Neither case undermines Binder's shorter sentence for less severe conduct.

Finally, Binder argues that the judge violated his right to privacy by revoking his probation based on legal sexual expression — *i.e.*, his use of non-pornographic pictures of children as a substitute for pornography.[8] But in crafting an appropriate sentence, the judge could consider the totality of the circumstances — including Binder's non-criminal conduct — that led to his discharge from sex offender treatment.[9] The judge appropriately considered Binder's lawful but dysfunctional conduct in imposing his sentence.

We conclude that Binder's sentence was not clearly mistaken.[10]

Why we direct the superior court to reconsider one of Binder's probation conditions

Binder challenges a condition of probation prohibiting his contact with minors without permission from his probation officer. For most of the time Binder has been on probation, his probation officer has precluded him from having contact with his

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[7] *See Paul*, 2014 WL 1168846, at *2-3 (upholding sentence of 39 months' imprisonment after defendant's third probation violation); *Banister*, 1998 WL 29856, at *2-3 (upholding sentence of 2½ years' imprisonment after Banister's discharge from treatment due to possessing child pornography and getting caught peering into the window of a twelve-year-old girl).

[8] *See* Alaska Const. Art. 1, § 22.

[9] *See, e.g.*, *Chrisman v. State*, 789 P.3d 370, 371-72 (Alaska App. 1990).

[10] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

two young daughters. She also has prohibited him from attending church services where minors would be present because of the potential for incidental contact with children.

Binder claims these restrictions violate his rights to religious freedom and family association.[11] The State concedes that we should direct the sentencing judge to consider whether the restrictions represent the least-restrictive alternatives, and we find this concession well-founded.[12]

Conditions of probation must be "reasonably related to the rehabilitation of the offender and the protection of the public and must not be unduly restrictive of liberty."[13] Probation conditions that restrict a defendant's constitutional rights are subject to special scrutiny: a sentencing judge must affirmatively consider and have good reason for rejecting any less-restrictive alternatives.[14]

As we have previously explained, "[a] person's right to the care and custody of their own child is a fundamental right recognized by both the federal and state constitutions."[15] And the Alaska Supreme Court has noted that "[n]o value has a higher place in our constitutional system of government than that of religious freedom."[16] When probation conditions potentially infringe fundamental constitutional rights, a sentencing

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[11] *See* Alaska Const. Art. 1, § 4 ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."); *Hinson v. State*, 199 P.3d 1166, 1174 (Alaska App. 2008) (noting that the "right to the care and custody of [one's] children" is protected by the due process clause).

[12] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (holding that a reviewing court may not accept a State's concession without first independently assessing its validity).

[13] *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977).

[14] *Peratrovich v. State*, 903 P.2d 1071, 1079 (Alaska App. 1995).

[15] *Hinson*, 199 P.3d at 1174.

[16] *Frank v. State*, 604 P.2d 1068, 1070 (Alaska 1979).

judge must scrutinize the conditions and consider whether less restrictive alternatives might suffice.[17]

Here, Binder requested that the sentencing court modify his conditions of probation to allow him to visit and attend church with his children. The judge declined this request, concluding that these issues were best left to the discretion of his probation officer. But it is the duty of the court in the first instance to determine whether conditions of probation are appropriately tailored to the needs of the public and the offender.[18]

While it may be appropriate for the court to delegate aspects of implementation to the probation officer, the judge should define a structure in which the probation officer's discretion is exercised. For example, Binder's visitation with his children and attendance at church might be feasible if supervised by a person approved by the court or the probation officer. We direct the trial court to reconsider this probation condition.

Why we find Binder failed to preserve his presentence report issue for appeal

Binder also argues that the trial court erred in failing to redact purported inaccuracies in his supplemental presentence report (the "letter update report"). But Binder did not file objections to that report in advance of the hearing as required by Alaska Criminal Rule 32.1(d)(5). Nor did he request a hearing explicitly focused on presentence report redactions.

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[17] *Smith v. State*, 349 P.3d 1087, 1094 (Alaska App. 2015).

[18] *See Beasley v. State*, 364 P.3d 1130, 1132-33 (Alaska App. 2015); *see also Peratrovich*, 903 P.2d at 1079.

While Binder took the stand at his disposition hearing and denied certain allegations in the presentence report, his attorney never asked the judge to redact unproven or irrelevant factual allegations from the presentence report. During his final argument, Binder's attorney made no reference to redaction issues. And when the judge imposed the sentence, Binder did not point out to the judge that he sought redactions under Criminal Rule 32.1(f)(5). The judge accordingly did not make individual findings of fact as to challenged allegations, and Binder then did not object to her failure to do so. Because Binder did not obtain rulings from the trial court on objections to contested facts in the presentence report, he has not preserved the issue for review.[19]

But because we have already concluded that a remand is appropriate for reconsideration of Binder's conditions of probation relating to visitation with his daughters and church attendance, the judge may, in her discretion, provide Binder with an opportunity to formally lodge objections to his presentence report. Any objections should then be adjudicated in accordance with the procedure provided by Criminal Rule 32.1(f), either in reliance on the existing record or through further proceedings.[20]

Conclusion

The term of imprisonment and the extension of probation imposed by the trial court are AFFIRMED. We REMAND this case to the superior court to consider whether the probation restrictions prohibiting Binder from visiting his children and attending church are narrowly tailored. The court may, in its discretion, provide Binder

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[19] *See Marino v. State*, 934 P.2d 1321, 1327 (Alaska App. 1997).

[20] *See, e.g.*, *Smith v. State*, ___ P.3d ____, Op. No. 2487, 2016 WL 358635 (Alaska App. Jan. 29, 2016).

an opportunity to lodge objections to factual allegations in his presentence report and proceed accordingly.